Field J.
324 Submitted Dec. 16.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~425.~~ 155

ZEB WARD, PLAINTIFF IN ERROR,

vs.

JOSEPH C. TODD, SURVIVOR OF THE FIRM OF TODD & RAFFERTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED JUNE 4, 1878.

C. J.

SUPREME COURT OF THE UNITED STATES.

No. 425.

ZEB WARD, PLAINTIFF IN ERROR,

vs.

JOSEPH C. TODD, SURVIVOR OF THE FIRM OF TODD & RAFFERTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Joseph C. Todd, survivor, plaintiff, and Zeb Ward, defendant, a manifest error hath happened, to the great damage of the said Zeb Ward, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of May, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred & second.

[SEAL.] RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—

HENRY C. CALDWELL,
District Judge.

The execution of the foregoing writ of error appears by the schedule hereto attached.

RALPH L. GOODRICH, *Clerk.*

Filed May 14, 1878.

RALPH L. GOODRICH, *Clerk.*

2 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that on the 11th day of February, 1878, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas, Joseph C. Todd, survivor, by Charles P. Redmond, esq., his attorney, and files therein his complaint at law against Zeb Ward, which complaint is as follows:

Circuit court of the United States, eastern district of Arkansas.

JOSEPH C. TODD, SURVIVOR OF THE FIRM OF Todd & Rafferty, plaintiff,
vs.
ZEB WARD, DEFENDANT. } Complaint at law.

The plaintiff, Joseph C. Todd, surviving partner of the firm of Todd

& Rafferty, who is a citizen of the State of New Jersey, complains of the defendant, Zeb Ward, who is a citizen of the State of Ar-
3 kansas, and resident of the eastern district of said State, and for cause of action states—

First. That at the times hereinafter mentioned the Fayette circuit court of the State of Kentucky was a court of general jurisdiction, duly created by the laws of that State.

Second. That on or about the 8th day of August, 1873, the plaintiff commenced an action in said court against the defendant by the filing of a petition and the issue of summons, which summons was duly and personally served on the defendant, and to which action said defendant afterward duly appeared and answered.

Third. That such proceedings were thereupon had that said plaintiff, by the consideration of the said Fayette circuit court held within and for the county of Fayette, and State of Kentucky, on the 27th of November, 1874, recovered a judgment against the said defendant for the sum of ten thousand seven hundred and thirty three $\frac{28}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from the 17th
4 day of June, 1872, until paid, and his costs therein expended, as by the record and proceedings in said court now remaining more fully appears, a copy of which record, duly authenticated, the said plaintiff now here in court produces, and files herewith as a part of this complaint. And which said judgment is in full force and effect, and not reversed, annulled, nor satisfied.

Fourth. That said judgment was duly and regularly made, adjudged, and given.

Fifth. That no part of said judgment has been paid except the sum of seven thousand dollars, to which last named amount said judgment has been satisfied by sale of defendant's property, as appears by said record.

Wherefore plaintiff prays judgment for his debt and interest thereon, and for such other and further relief as the nature of the case may demand.

CHAS. P. REDMOND,
Attorney for the Plaintiff.

5 Charles P. Redmond says that he is the attorney for the plaintiff, Joseph C. Todd, who is now absent from the eastern district of Arkansas, and that affiant believes the statements of the foregoing petition to be true.

CHAS. P. REDMOND.

Subscribed and sworn to before me this 11th day of February, 1878.
RALPH L. GOODRICH, *Clerk.*

I, Charles P. Redmond, acknowledge myself security for all costs for which the plaintiff may be liable in this suit.

CHAS. P. REDMOND.

Filed and writ issued Feb. 11th, 1878.
RALPH L. GOODRICH, *Clerk.*

6 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden

on Monday, the 8th day of April, anno Domini one thousand eight hundred and seventy-eight, at the United States court room, in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on April 15th, 1878:

JOSEPH C. TODD, SURVIVOR,
vs.
ZEB WARD.

Comes the defendant by U. M. Rose and Henderson & Carruth, esqs., his attorneys, and files herein his answer.

Which answer is as follows:

Answer.

JOSEPH C. TODD, SURVIVOR, &C., PL'FF,
vs.
ZEB WARD, DEF'T.

The defendant, Zeb Ward, comes and defends, and for answer to plaintiff's complaint herein or so much thereof as he is advised is material for him to answer, says that he denies that he is indebted to the said plaintiff in manner and form as alleged, or in any other manner and form, or in any sum whatever.

Further answering, this defendant states and charges that on or
7 about the 8th day of August, 1873, the said plaintiff brought suit against him in the Fayette circuit court, in the Commonwealth of Kentucky, to recover two promissory notes, one for $3,528.00, the other for $10,733.28, and to foreclose a mortgage on his bagging factory in the city of Lexington, executed by this defendant to plaintiff to secure the same. Said two notes were executed to plaintiff in payment of certain bagging machinery, purchased from him, and which machinery was at that time, and always thereafter, in the factory so mortgaged.

Defendant states that the mortgage so executed to plaintiff was on the house and lot in said city occupied by him as a mill or factory and the machinery therein contained. Said house and lot was of the value of twelve thousand dollars, and the same contained machinery and fixtures, making the total value thereof fifty-four thousand dollars, so that in addition to the said mill and ground there was $27,739.00 worth of machinery and fixtures bought and paid for and unen-
8 cumbered other than the $14,261.00 for which said mortgage was given and due said plaintiff.

Defendant further states that after the said suit had been brought, and but shortly before there was a judgment of sale of his said property, it was agreed by and between plaintiff and this defendant that he, the said plaintiff, would take, accept, and receive the property so mortgaged in payment of his said debt, and that the same should be discharged and held for naught. This defendant was at that time, and had been for a long time before, a citizen of Arkansas, and acting upon the said contract and agreement, and supposing it was being acted upon in good faith by the said plaintiff, remained in Arkansas, then in a greatly disturbed condition, looking after his own affairs, which required his personal presence, awaiting the preparation of all necessary papers, in accordance with their said contract, by which said suit was to stop
9 and be dismissed, and the property above set out taken in full payment of his said debt.

But this defendant states and charges that in violation of his said contract, and with a view to deceive and defraud this defendant, the said plaintiff, without this defendant's knowledge, who was at that time in Arkansas, aforesaid, proceeded with his said suit, and fraudulently took a judgment of sale against this defendant's property. Defendant never knew when said judgment was taken, or that it was taken, until long after it was done, and plaintiff bid thereon only the sum of $7,000, and purchased the same, although he well knew of his contract aforesaid, and that said property was worth many thousand dollars more than that amount. Def't, further answering, says, that fraudulently conspiring with persons to this defendant unknown, the said property was advertised in so vague and indefinite a manner as not to call attention to the real value of the said property, whereby competition
10 in bidding was cut off and prevented, and he was enabled to purchase the same at $7,000, leaving several thousand dollars due on the judgment against the defendant, whereby he was enabled fraudulently to get all of said defendant's property, and still hold a judgment over against him for a large balance.

Wherefore this defendant states and charges that the said judgment in plaintiff's complaint set out and sued on herein was obtained by fraud, covin, and deceit, and can have no binding force against him, and this he pleads as a defense thereto.

Second. Further answering, this defendant states and charges that there is no such judgment against him, to wit, for $10,733\frac{25}{100}$, with interest at the rate of seven per cent. per annum from the 17th day of June, 1872, or any other amount, in the Fayette circuit court, as set out in plaintiff's complaint, and pleads nul tiel record.

Third. Further answering, this defendant states and charges that the said plaintiff agreed with him to take the said property, mort-
11 gaged as aforesaid, in full satisfaction and discharge of his said debt, and that he did by fraudulent devices as aforesaid get possession of, and still holds, all of said property; wherefore defendant says that the said debt and judgment have been paid, and he pleads an accord and satisfaction in bar of the said claim.

Now, having fully answered, this defendant asks to be hence dismissed without a day, together with his reasonable costs herein expended.

U. M. ROSE,
HENDERSON & CARRUTH,
Att'ys for Defendant.

W. H. Ward states on oath that the defendant, Zeb Ward, is absent from Pulaski County and this State; that he is his agent, and that he believes the foregoing allegations to be true.

W. H. WARD.

Subscribed and sworn to before me this 15th April, 1878.
[SEAL.] C. T. WALKER,
Notary Public.

12 On April 16th, 1878, as follows:

JOSEPH C. TODD, SURVIVOR, }
vs. }
ZEB WARD. }

Comes the plaintiff, by Chas. P. Redmond, esq., his attorney, and files herein his demur'ers to the first and the third paragraphs of the answer,

and also his motions to make the third paragraph of answer more definite, to strike third paragraph of answer, and to compel defendant to elect between the second and third paragraphs of his answer.

Which demurrers and motions are as follows:

Demurrer.

Circuit court of the United States, eastern district of Arkansas.

JOSEPH C. TODD, SURVIVOR,
vs.
ZEB WARD.

13 Comes the plaintiff and demurs to the first paragraph of defendant's answer, because the same does not state facts sufficient to constitute a defense to this action.

CHAS. P. REDMOND,
Att'y for Plaintiff.

Circuit court of the United States, eastern district of Arkansas.

JOSEPH C. TODD, SURVIVOR, PLAINTIFF,
vs.
ZEB WARD, DEFENDANT.

Now comes the said plaintiff and demurs to the third paragraph of defendant's answer, because the same does not state facts sufficient to constitute a defense to this action.

CHAS. P. REDMOND,
Att'y for Plaintiff.

Circuit court of the United States, eastern district of Arkansas.

JOSEPH C. TODD, SURVIVOR, PLAINTIFF,
vs.
ZEB WARD, DEFENDANT.

14 Motion to make third paragraph of answer more certain.

Comes the plaintiff and moves the court that the defendant be required to make the third paragraph of his answer more definite and certain as to the date of the alleged agreement to take the property mortgaged and sold; and to state whether it is the same agreement referred to in the first paragraph of said answer.

CHAS. P. REDMOND,
Attorney for Plaintiff.

And that said paragraph be made to show whether the same is intended to set out full payment of the judgment or an accord *ord* and satisfaction of the same.

C. P. R.

JOSEPH C. TODD, SURVIVOR,
vs.
ZEB WARD.

Motion to strike out 3rd plea, paragraph of answer first.

15 And now comes the said plaintiff and moves the court to strike

out the third paragraph of defendant's answer, because the same contradicts and is inconsistent with the second paragraph of said answer.

2nd. Because the same is a frivolous defence for delay.

3rd. Because the same is insufficient in law.

CHAS. R. REDMOND,
Att'y for Plaintiff.

Because the same is too vague and uncertain for a defence in this cause.

CHAS. P. REDMOND,
Att'y for Pl'ff.

JOSEPH C. TODD, SURVIVOR,
vs.
ZEB WARD.

Motion to compel defendant to elect between 2nd & 3rd pleas.

16 Comes the plaintiff and moves the court that the defendant be required to elect between the second and third paragraphs of his answer, because the same are contradictory and inconsistent.

CHAS. R. REDMOND,
Attorney for Plaintiff.

On April 17th, 1878, as follows:

JOSEPH C. TODD, SURVIVOR,
vs.
ZEB WARD.

Comes the plaintiff, by Chas. P. Redmond, esq., his attorney, and by leave of the court withdraws his motion to strike the third paragraph of the answer, and to make the third paragraph more specific; and comes the defendant by U. M. Rose and Henderson & Carruth, esq's, his attorneys, and the motion to compel the defendant to elect between the second and third paragraphs of the answer is heard, argued, and
17 submitted to the court; and the court being now well and sufficiently advised in the premises considers that said motion be overruled.

And the demurrers to the first and third paragraphs of the answer are heard, argued, and submitted to the court, and the court not being now well and sufficiently advised in the premises takes time to consider of its judgment herein.

On April 18th, 1878, as follows:

JOSEPH C. TODD, SURVIVOR,
vs.
ZEB WARD.

Comes the plaintiff, by Chas. P. Redmond, esq., his attorney, and comes the defendant, by U. M. Rose and Henderson and Carruth, esq's, his attorneys, and now the court being well and sufficiently of the matters arising on the demurrers to the first and third paragraphs of the answer, considers that the same be sustained.

On April 29th, 1878, as follows:

18 JOSEPH C. TODD, SURVIVOR,
vs.
ZEB WARD.

Comes the plaintiff, by Chas. P. Redmond, esq., his attorney, and comes the defendant, by U. M. Rose and Henderson and Carruth, esq., his attorneys; and the said defendant declining to answer further, this cause is submitted to the court upon the defendant's plea of nul tiel record and the transcript of record filed herein by the plaintiff, and the court being well advised in the premises finds the issues for the plaintiff, and assesses his damages at six thousand nine hundred and forty-three dollars and ninety-seven cents.

It is therefore considered, ordered, and adjudged that said plaintiff do have and recover of and from said defendant the sum of six thousand nine hundred and forty-three dollars and ninety-seven cents (6,943.97), for his damages, together with all his costs in and
19 about this suit expended, and have execution therefor, with interest on said damages at the rate of seven per centum per annum from this date until paid.

On May 1st, 1878, as follows:

JOSEPH C. TODD, SURVIVOR,
vs.
ZEB WARD.

Comes the defendant, by U. M. Rose and Henderson and Carruth, esqs., and files herein his bill of exceptions, which is signed and sealed by the court.

Which bill of exceptions is as follows:

JOSEPH C. TODD
vs.
ZEB WARD.

Be it remembered that on the trial of this cause the plaintiff offered in evidence a transcript of the proceedings and judgment sued on, the same being in words and figures as follows:

20 STATE OF KENTUC'Y:

Fayette circuit court.

Pleas held before the Hon. J. D. Hunt, judge for said circuit, on the 3rd day of February, 1875.

Be it remembered that heretofore, on the 8th day of August, 1873, there was filed in the office of the clerk of said court a petition wherein Joseph C. Todd, survivor of the firm of Todd and Rafferty, were plaintiffs, and Zeb Ward and the City of Lexington were defendants, which said petition is in the words and figures as follows, to wit:

Petition in equity.

Fayette circuit court.

JOSEPH C. TODD, SURVIVOR OF THE FIRM OF Todd & Rafferty, plaintiffs,
against
ZEB WARD & CITY OF LEXINGTON, DEFENDANTS.

The plaintiff, J. C. Todd, survivor of the firm of Todd and Rafferty, states that the defendant, Zeb Ward, by his promissory
21 note dated Lexington, Ky., July 31st, 1872, agreed and promised to pay plaintiff, one year from the date thereof, the sum of three thousand five hundred and twenty-eight ($3,528) dollars, with interest from date till paid, at the rate of seven per cent. per annum. No part of said debt has been paid. Said note is filed herewith.

Plaintiff further states that said Ward, for the purpose of securing payment the said debt, on the 31st day of July, 1872, duly executed a deed of mortgage to plaintiff on the factory or mill property, including all the machinery, fixtures, and furniture in the same, which is situated in the city of Lexington, Ky., on Vine and Water streets, near the planing mill lately owned by G. D. Wilgus. Said mortgage was duly recorded in the Fayette County clerk's office. The said original deed is filed herewith and made part of this petition.

Plaintiff further states that said Ward, the defendant, on the 17th of June, 1872, by his promissory note of that date, agreed to pay
22 the firm of Todd and Rafferty, two years from the date of said note, the sum of ten thousand seven hundred and thirty-three and $\frac{28}{100}$ ($10,733.28) dollars, and interest on the same from date till paid, at the rate of seven per cent. per annum. Said note is in the following words and figures, viz:

$10,733.28.] LEXINGTON, KY., *June 17th*, 1872.

Two years from date I promise to pay to the order of Todd & Rafferty ten thousand seven hundred and thirty-three & $\frac{28}{100}$ dollars, and with interest from date at the rate of seven (7) % per annum till paid.

ZEB WARD.

This note is secured by mortgage duly stamped.

Plaintiff states that said firm of Todd and Rafferty was composed of this plaintiff and Phillip Rafferty, who died upon the day of , 1872, and that plaintiff as survivor is entitled to the said debt set forth in the 2nd paragraph of this petition.

23 The said note will be filed herein when required.

Plaintiff states that with a view to secure and protect said last mentioned debt, the defendant Ward, upon the 17th of June, 1872, and simultaneously with the execution of said note, executed and delivered to the said Todd and Rafferty a deed of mortgage to the same property mentioned and set forth in the 1st paragraph of this petition, which mortgage is a prior lien upon said property to the one set forth in the 1st paragraph herein. Said first mortgage of date June 17th, 1872, was duly recorded in the Fayette County clerk's office. The original is filed herewith and made part of this petition. No part of the debt secured by the same has ever been paid.

3. Plaintiff further states that said mortgaged property was duly assessed for State taxes for the year 1872, in the sum of $51.98; that the defendant Ward failed and refused to pay the same as required,
24 and that upon proper demand and notice said mortgaged property was duly sold for said taxes and commissions, in all amounting to the sum of $55.09, upon Monday, July 14th, 1873, by R. F. Bullock, sheriff of Fayette County, and the same was purchased at the time by this plaintiff for said sum of $55.09; a sheriff's receipt for said sum is filed herewith, marked Exhibit C.

By virtue of said sale and purchase plaintiff became the holder and owner of the lien held by the State upon said property as of January 10th, 1872, and he avers that he has a lien upon the same in the sum of 55.09, with interest from July 14th, 1873, till paid, at the rate of 10 per cent., and also for damages on the same, amounting to 20 per cent. No part of said debt, interest, or damages has been paid. Plaintiff charges that the property upon which the three liens set forth in the foregoing part of this petition are held is not susceptible of division for sale, the buildings covering nearly the entire lot of ground; that the defendant Zeb Ward is a non-resident of the State of Ky.
25 He further states that he is informed that the defendant, the city of Lexington, has a lien or claim upon said mortgaged property for some unpaid purchase money for the lot of land upon which said factory building is erected, and he calls upon said city to set up and show the nature and extent of said claim; wherefore he prays for judgment for the debt set up in the 1st paragraph of the petition, for a foreclosure of the mortgage securing said debt, for a sale of the mortgaged property in the exhibits mentioned and payment of said first debt, and that the court will retain the residue of the proceeds to satisfy the debts set forth in the 2d & 3d paragraphs, and for all general and special relief in the premises.

KINKEAD & DARNALL, *P. Q.*

Geo. W. Darnall says he is the agent for J. C. Todd, survivor of the firm of Todd & Rafferty, who is now absent from Fayette County,
26 and that he believes the statements made in the above and foregoing petition are true.

GEO. W. DARNALL.

Sworn to before me by Geo. W. Darnall this 8th day of August, 1873. Att.:

J. B. RODES, *C. F. C. C.*

The exhibit filed is as follows, viz:

$3,528.00.] LEXINGTON, KY., *July 31st*, 1872.

One year from date I promise to pay to the order of Joseph C. Todd, survivor of the firm of Todd & Rafferty, the sum of three thousand five hundred and twenty-eight dollars, with interest from date at the rate of 7 % per annum till paid, for new machinery this day received by me.

ZEB WARD.

This note is secured by mortgage duly stamped.

The mortgage filed with said petition as an exhibit is as follows:

This indenture, made this 31st day of July, 1872, between Zeb
27 Ward, of the county of Fayette and State of Kentucky, of the first

part, and Joseph C. Todd, survivor of the firm of Todd and Rafferty, of Patterson, New Jersey, of the second part, witnesseth:

That for and in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, and for the further consideration of three thousand five hundred and twenty-eight dollars in machinery furnished, sold and delivered *sold and delivered* this day by said second party to said first party, and evidenced by said first party's note of even date herewith and due in one year for the said sum of $3,528.00, bearing interest from date at the rate of 7 % per annum, the party of the first part does bargain, sell, convey, release and grant to the party of the second part, and their heirs and assigns, the following described real and personal estate, to wit: the house and lot of land in the city of Lexington, Ky., used and occupied at this date by said Ward as a hemp
28 and bagging factory or mill, located in said city on Vine and Water streets, near the shop and mill of G. D. Wilgus, esq.;

Also all the machinery, consisting of 2 24-spindle rooving frames and eight power-looms and the attachments thereto connected and necessary to the running and working of the same, and engines, boilers, fixtures and furniture, which are in said factory and buildings at this date, together with the rights, privileges and appurtenances thereunto belonging; to have and to hold the property hereby conveyed to the party of the second part, to them and their heirs forever; and the said Z. Ward covenants that he will warrant generally the property hereby conveyed; provided, however, that the said Ward shall pay or cause to be paid the said note for $3,528.00 at its maturity with all interest thereon, and provided the said Ward shall pay all costs of keeping and holding a policy of insurance against fire in said mortgaged property in the name or on behalf of the said Joseph C. Todd, survivor of the firm of Todd
29 and Rafferty, in the full sum of $3,528.00, for the full time of one year from this date, said policy to be taken out in a good and approved fire insurance company, then these presents shall be void.

In testimony whereof the party of the first part hereunto sets his hand and seal the day and year first above written.

ZEB WARD. [SEAL.]

[Stamp 4$.]

STATE OF KENTUCKY,
Fayette County, sct:

I, Allie G. Hunt, clerk of the Fayette County court, certify that the foregoing mortgage from Zeb Ward to Todd & Rafferty was this day produced to me in my office duly stamped, and acknowledged by Zeb Ward to be his act and deed and ordered to be recorded, which has been done.

This 31st day of July, 1872.

ALLIE G. HUNT, *Clk,*
By D. REER BROWNING, *D. C.*

The other mortgage filed with said petition is in words and fig-
30 ures following, to wit:

This indenture, made this 17th day of June, A. D. 1872, between Zeb Ward, Mary E. Ward, his wife, of the county of Fayette and State of Kentucky, of the first part, and Todd and Rafferty, of Patterson and State of New Jersey, of the second part, witnesseth:

That for and in consideration of one ($1.00) dollar in hand paid, the

receipt of which is hereby acknowledged, and in the further consideration of a debt due by said Ward amounting to $10,733.28 and evidenced by his note of even date herewith to Todd & Rafferty, due and payable two years from date, with interest thereon at the rate of 7 % per annum till paid, the party of the first part do bargain, sell, convey, release and grant to the party of the second part, and their heirs and assigns, the following described real and personal estate, to wit: the house and lot of ground in the city of Lexington, Kentucky, used and occupied at this date by said Ward as a hemp and bagging factory, and located in
31 said city on Vine and Water streets near the shop and mill of Garrett Wilgers, also all the machinery, engines, boilers, fixtures, and furniture (said machinery consisting of eight power looms and the attachments thereto connected and necessary to the running and working of the same), which are in said factory and building at this date, together with the rights, privileges, and appurtenances thereunto belonging, to have and to hold the property hereby conveyed to the party of the second part to them and their heirs forever, and the said Z. Ward covenants that he will warrant generally the property hereby conveyed; provided, however, that the said Ward shall well and truly pay or cause to be paid said note of $10,733.28 at its maturity with all interest thereon, and provided the said Ward shall pay all costs of keeping and holding a policy of insurance against fire on said mortgaged property in the name and in the behalf of said Todd & Rafferty in the full sum of $10,733.28 for the full time of two years from this date, said policy
32 or policies to be taken out in good and approved fire insurance companies, then these presents shall be void.

In testimony whereof the party of the first part has hereunto set his hand and seal, the day and year first above written.

ZEB WARD. [SEAL.]

[Revenue stamp.]

STATE OF KENTUCKY,
County of Fayette, sct:

I, Allie G. Hunt, clerk of the county court for the county aforesaid, do certify that this mortgage from Zeb Ward and Mary E. Ward, his wife, to Todd & Rafferty was on the 22nd day of June, 1872, produced to me in my office duly stamped according to act of Congress and acknowledged by Zeb Ward to be his act and deed, and on this day said mortgage was again produced to me and ordered to record, whereupon said mortgage and this certificate have been duly admitted to record in my office.

33 Given under my hand this the 8th day of July, 1872.

Att.:

ALLIE G. HUNT, *Clerk*,
By FRANK W. WOOLLEY, *D. C.*

Exhibit C filed with said petition is as follows, to wit:

I, Robert S. Bullock, sheriff of Fayette County, do certify, that with proper tax receipt signed by me for the year 1872, which was first presented to Zeb Ward and the taxes therein demanded and refused, the same was duly levied on the property hereinafter described, and after due advertisement for fifteen days next preceding the day of sale, the same was by me exposed for sale at public auction to the highest bidder at the court-house door in the city of Lexington, on Monday, the 14th day of July, 1873, being county court day, wherein failing to get a

bid of the taxes and costs for and less portion than the whole of said property the whole was exposed for sale and Joseph C. Todd (sur-
34 vivor of Todd & Rafferty) became the purchaser at the sum of fifty-five $\frac{0}{100}$ dollars in full of the State taxes due thereon of $51.98; my commission, 3.11—$55.09, for the following property, to wit:

One lot and brick house thereon used as a factory situated on Sewer street and on and between Vine and Water streets in the city of Lexington, Kentucky, and opposite the freight depot of the Louisville, Lexington and Cincinnati Railroad.

I further certify that within ninety days after said sale, a report of the same was made to the clerk's office of the Fayette County court.

R. S. BULLOCK,
Sheriff of Fayette County.

And on the filing of said petition the following warning order was entered therein, viz:

Warning order.

STATE OF KENTUCKY, *sct:*

Fayette circuit court.

AUGUST 8TH, 1873.

JOSEPH C. TODD, SURVIVOR OF THE FIRM OF Todd & Rafferty, plaintiff,
vs.
35 ZEB WARD, &C., DEFENDANTS.

The non-resident defendant Zeb Ward is warned to appear in this court on the first day of its next November , 1873, and answer the petition of plaintiff, & H. M. Buford, esq., is appointed corresponding attorney for the non-resident defendant Zeb Ward herein.

Att.:

J. B. RODES, *C. F. C. C.*

And on the filing of said petition there was sued out of the office of the clerk of said court a summons as follows, viz:

Summons in equitable proceedings.

The commonwealth of Kentucky to the sheriff of Fayette County:

You are hereby commanded to summon Zeb Ward and the city of Lexington to answer in twenty days after the service of this summons on them a petition filed against them in the Fayette circuit court by Joseph C. Todd, survivor of the firm of Todd and Rafferty, and warn them that upon their failure so answer, the petition will be taken for
36 confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next November term of said court.

Witness Jos. B. Rodes, clerk of said court, this 8th day of August, 1873.

Att.:

J. B. RODES, *C. F. C. C.*

Said summons was returned endorsed:

Executed Aug. 28, 1873, by delivering a true copy of the within summons to J. F. Frazer, mayor of the city of Lexington.

S. P. TARLTON, JR., *S. F. C.*,
By W. S. NEALE, *D. S.*

Executed Sept. 8th, 1873, by delivering a true copy of the within summons to Zeb Ward.

S. P. TARLTON, JR., *S. F. C.*,
By THEO. M. SHAW, *D. S.*

And afterwards the said plaintiff by his attorney, on the 17th day of September, 1873, filed his amended petition with one exhibit therein, in the office of the clerk of said court, which is in words and figures following, to wit:

Amended petition in equity.

Fayette circuit court.

JOSEPH C. TODD, SURVIVOR OF THE FIRM of Todd & Rafferty, plaintiff,
vs.
ZEB WARD, &C., DEFENDANTS.

The plaintiff, by way of amendment to his original petition herein, states that since the filing of said original petition, and with a view to satisfy the debt due the defendant, the City of Lexington, the plaintiff upon the 17th day of September, 1873, paid to the said city the sum of $680, in full of the debt due said city by this defendant Ward for the purchase price of said lot upon which the factory of said Ward is located, and the same described and set forth in the original petition and exhibits therein filed.

Plaintiff avers that upon the 29th of June, 1871, said Ward agreed to pay said city the sum of $600 for said lot in cash, and was to receive a deed of conveyance from said city for the lot. That deed was duly prepared at the time and ready to be delivered, but said Ward failed and refused to pay for the same, though he entered upon and took possession of said lot and erected valuable and large buildings upon it,
38 and has been since in the uninterrupted possession and use of the same.

Plaintiff avers that the said debt due by the said Ward to the city was and is a prior lien and claim upon said premises to either of the debts set forth in the original petition herein.

He avers that upon the 17th of Sept., 1873, he became the purchaser and owner of said claim and lien—the said city at the time of the payment by plaintiff aforesaid immediately delivered to plaintiff the said deed to Ward for said lot, dated June 29th, 1871. Said deed has been duly recorded in the Fayette County clerk's office in deed-book No. , page . The original deed is filed herewith, a receipt from said city through its collector J. F. Robinson, jr., to plaintiff for said sum of $680 is filed herewith; said debt is now due, no part of the same has ever been paid.

Therefore plaintiff prays, as in his original petition, and also for an enforcement of the lien set up in this amendment; for a sale of
39 the property to satisfy the said lien; for all general and special relief in the premises.

KINKEAD & DARNALL, *P. Q.*

The receipt is as follows:

PHŒNIX HOTEL,
Lexington, Ky., Sept. 17th, 1873.

Rec'd from J. C. Todd, survivor of Todd and Rafferty, per Kinkead and Darnall, att'ys at law, six hundred and eighty dollars in full of the amount due by Zeb Ward to the City of Lexington for the purchase of lot situated on Water and Vine streets in said city, the same upon which said Ward's factory is built, which was conveyed to said Ward by the city by deed dated June 29th, 1871.

J. F. ROBINSON,
City Collector.

The deed filed as an exhibit with said petition from the City of Lexington to Ward is as follows:

This indenture made this twenty-ninth day of June, one thousand eight hundred and seventy-one, between the City of Lexington, of
40 the county of Fayette and State of Kentucky, of the first part, and Zeb Ward, of the county of Fayette and State of Kentucky, of the second part, witnesseth:

That for and in consideration of the sum of six hundred dollars to said city in hand paid, the receipt whereof is hereby acknowledged, the party of the first part doth bargain, sell, convey, release, and grant unto the party of the second part, and his heirs and assigns, all the lot or parcel of ground in the city of Lexington bounded on the southeast by Lower street, on which it fronts forty-four feet, on the northwest by Merino street, on which it fronts forty-four feet, on the northeast by Water street and on the southeast by Vine street, on which two streets the lot fronts from Upper to Merino streets; together with the rights, privileges, and appurtenances thereunto belonging; to have and to hold the property hereby conveyed to the party of the second part and his heirs and assigns forever; and the said party of the first part
41 covenants that it will warrant generally the property hereby conveyed; and it is stipulated and agreed that the second party shall not be required to make a sidewalk along said lot, Vine street, nor shall such sidewalk be made at his expense as the owner of said lot.

In testimony whereof the party of the first part hereunto sets its seal the day and year first above written, and hath caused to be hereto affixed the signature of J. T. Frazer, its mayor, of M. C. Johnson, chairman of the judiciary committee, and of J. F. Robinson, jr., its collector.

[SEAL OF THE CITY.]

J. F. FRAZER, *Mayor.*
M. C. JOHNSON, [SEAL.]
Chrn. Judiciary Com'tee.
J. F. ROBINSON, [SEAL.]
City Coll'r.

STATE OF KENTUCKY,
Fayette County, sct:

I, Allie G. Hunt, clerk of the Fayette County court, certify the foregoing deed to Zeb Ward was this day produced to me in my office, duly stamped, and acknowledged to be the act and deed of the City of
42 Lexington by J. T. Frazer, its mayor, M. C. Johnson, ch'm'n of the judiciary committee, and James F. Robinson, jr., its collector, and that the seal thereto attached is the corporation seal of said city.

And on this day said deed was again produced to me and ordered to be recorded, which has been done.

September 17th, 1873.

ALLIE G. HUNT, *Clk.*

And on filing said petition there was issued a summons *was issued* thereon as follows, viz:

Summons in equitable proceedings.

The commonwealth of Kentucky to the sheriff of Fayette County:

You are commanded to summon Zeb Ward to answer in twenty days after the service of this summons on him a petition and amended petition filed against him in the Fayette circuit court by Joseph C. Todd, survivor of the firm of Todd and Rafferty, and warn him that, upon his failure to answer, the petition will be taken for confessed, or he
43 will be proceeded against for contempt; and you make due return of this summons on the first day of the next November term of said court.

Witness Jos. B. Rodes, clerk of said court, this 17th day of Sept., 1873.

Att.:

J. B. RODES,
C. F. C. C.

Said summons was returned endorsed as follows, viz:

Executed Sept. 18, 1873, by delivering a true copy of the within summons to Zeb Ward.

S. P. TARLTON, JR.,
S. F. C.,
By WM. S. NEALE, *D. S.*

And in said court, at a term continued and held on the 19th day of November, 1873, the following proceedings were had, viz:

J. C. TODD, SURVIVOR OF THE FIRM OF TODD & Rafferty, plaintiff,
against
ZEB WARD, DEFENDANT.
} In equity.

This cause was this day heard. The defendant having been duly summoned and failing to answer, it is adjudged by the court that
44 the plaintiff recover of the defendant, Zeb Ward, the sum of three thousand five hundred and twenty-eight dollars, with interest thereon at the rate of seven (7) per cent. per annum from the 31st day of July, 1872, until paid, and his costs herein expended.

It is further adjudged that the equity of redemption of the defendant, Zeb Ward, in the mortgaged property under the mortgage deed of July 31st, 1872, be foreclosed.

It is further adjudged by the court that plaintiff has a lien which is now due upon said mortgaged property as well as upon the entire lot of ground, as set up in the 3rd paragraph of his original petition, for the sum of fifty-five dollars and nine cents, with interest thereon at the

rate of ten per cent. per annum from the 14th day of July, 1873, until paid.

It is further adjudged by the court that the plaintiff has a lien which is now due upon said mortgaged property as well as upon the entire lot of ground mentioned in the amended petition herein, which
45 was conveyed by the city of Lexington to said Ward by deed dated 29th June, 1871, which deed is filed herein as an exhibit in said amended petition, for the sum of six hundred dollars, with six per cent. interest per annum from the 29th day of June, 1871, until paid.

It is further adjudged by the court that the plaintiff has a further lien upon said mortgaged property in the sum of $ ten thousand seven hundred and thirty-three dollars and twenty-eight cents, with interest thereon at the rate of seven per cent. per annum from the 17th day of June, 1872, until paid, as set forth in the second paragraph of the original petition herein, which lien arises under the deed of mortgage dated June 17th, 1872, which is filed herein, and it appearing to the court from the pleadings and exhibits herein that said last-mentioned lien and debt does not become due until June 17th, 1874, but that all of said debts and liens are upon the same property in part, and it also appearing that said property cannot be sold in part, and that it is
46 not susceptible of division, it is therefore adjudged by the court that so much of said property as is sufficient to pay the debts, liens, and costs aforesaid, and expenses of sale, be sold at public auction at the court-house door in Lexington, on a day to be fixed by the commissioner, making the sale on a credit of six, twelve, and eighteen months, the purchaser giving bond with sufficient personal security for the price, which bonds shall have the force of a judgment and remain a lien upon the property till paid.

The commissioner making the sale is directed to first offer so much of the lot mentioned in deed of June 29th, 1871, from the city of Lexington to said Ward, upon which no building stands, as will be necessary to pay off and discharge the two liens mentioned herein, viz, one for $55.00, with ten per cent. from July 14th, 1873, until paid, and the other for $600, with six per cent. interest from 29th of June, 1871, until paid. If the property so offered does not sell for enough to pay off the two said liens, then the residue shall be included in the amount
47 for which the mortgaged property is sold, viz, the lot and building and the machinery therein contained, as set forth in the two mortgage deeds.

The master commissioner, B. G. Thomas, is ordered to make the sale, and is allowed $200 for his services, to be taxed as part of the costs. The time, place, and terms of sale shall be advertised for two weeks next preceding the day of sale in the Lexington Press, a newspaper printed & published in the city of Lexington. Execution may be issued for any part of the debt first mentioned herein, and costs adjudged to the plaintiff that may remain unpaid by the sale of the mortgage property.

The master is directed to report under this judgment to the next special or general term of this court following the day of sale, and the cause is continued.

And at a term of court continued and held for said circuit on the 29th day of November, 1873, among other proceedings had were the following, viz:

48 JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
vs.
ZEB WARD, DEFENDANT. } In equity.

H. P. McGrath and Mrs. Mary E. Ward this day offered to file their petitions herein, which is noted, and moved to set aside the judgment herein.

And afterwards, in said court, on the 6th December, 1876, in said cause—

JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
vs.
ZEB WARD, DEFENDANT. } In equity.

The defendant, Zeb Ward, upon affidavit filed herein, moved the court to set aside the judgments herein, and offered to file his answer in this case, which is noted, which motion was heard and time taken to consider the same.

And afterwards, on the 8th day of December, 1873, in said court in said case the motion of the defendant, Zeb Ward, herein is sus-
49 tained, and the judgments herein are ordered to be set aside and leave is given said Ward to file his answer heretofore tendered herein, which was thereupon filed, which is noted, and he is made a party defendant to this action.

To which plaintiff excepts.

The affidavit of Zeb Ward, filed and noted December 6th, 1873, is as follows, viz:

Affidavit.

,Fayette circuit court.

TODD, SURVIVOR,
vs.
ZEB WARD.

Def't*s*, Zeb Ward, says that he failed to file an answer herein for the following reasons:

He had not examined the petition and supposed it was merely filed for the purpose of foreclosing the mortgage debt of already due, and as he was coming to Ky. to attend this November term of this court on other business, he thought he would be in ample time to take any steps necessary to protect his interests, by providing what
50 part of the mortgaged property should be *should* to satisfy said debt. He was detained in Arkansas by important business so that he did not reach Lexington till the night of the 25th day of November, 1873, and did not know until after his arrival that the plaintiff claimed anything more than the foreclosure of the debt aforesaid.

ZEB WARD.

Sworn to by Zeb Ward Dec. 6, 1873.
Att.:

J B. RODES,
C. F. C. C.

The answer of Ward, as filed Dec. 8, 1873, is as follows, viz:

Defendant's answer.

Fayette circuit court.

TODD, SURVIVOR, }
vs. }
ZEB WARD. }

1. Def't, Ward, for answer, says that the debt of pl'ffs set up herein as a mortgage lien on his property for is not yet due, and they are not entitled to foreclose the same.

2. He says further that pl't'ff has no lien on the property in
51 question in this action for any money he may have paid to the city of Lexington; said city executed to def't a deed in fee simple, not reserving any lien for purchase money. If pl't'ff paid any sum to the city on account of said purchase money, he did so without the request or knowledge of def't and of his own motion and for his own purposes.

3. Def't says that pl't'ff is not entitled to foreclose any lien he may have acquired under the sheriff's sale for tax, the same not being yet due.

4. Def't says that the mortgaged property is susceptible of division, the same consisting in part of the factory and in part of the machinery, and that either the one or the other is amply sufficient to satisfy the debt of now due the pl't'ff.

Therefore he prays that only so much of the property be sold as may be necessary to pay the debt now due; that the judgment already rendered herein be set aside, and for all proper relief.

BUFORD.
52 HUSTIN & MULLIGAN, *P. D.*
ZEB WARD.

Sworn to by Zeb Ward, Dec. 6th, 1873.
Att.:

J. B. NORTON, *D. C.*

The petition of Mrs. Mary E. Ward as offered to be filed December 5, 1873, is as follows:

Petition of Mrs. Mary E. Ward.

Fayette circuit court.

TODD, SURVIVOR, PL'FF, }
vs. }
ZEB WARD, DEF'T. }

Mary E. Ward says she is the lawful wife of Zeb Ward, the def't in this action, and as such is entitled to a contingent right of dower in the real estate herein ordered to be sold by the judgment entered on the day of the present term of this court. Said judgment orders said real estate to be sold absolutely without reserving or regarding the right of said to dower in the same. She did not unite with her husband in the execution of the mortgages sought to be foreclosed

53 in this action, nor has she united in the execution of any instrument conveying or relinquishing her right of dower in said real estate.

Wherefore she prays the court to protect her interest in said real estate and that the order of sale aforesaid be set aside and for all legal and equitable relief.

And afterwards, on the 6th day of December, 1873, at a term of court continued and held for said circuit, the following order was had, viz:

JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, DEFENDANT. } In equity.

The defendant, Zeb Ward, upon affidavit filed herein, moved the court to set aside the judgment herein, & offered to file his answer in this case, which is noted.

Which motion was heard and time taken to consider the same.

The affidavit of Ward as filed Dec. 6th, 1873, is as follows, viz:

Affidavit.

Fayette circuit court.

54 TODD, SURVIVOR, }
vs.
ZEB WARD. }

Def't, Zeb Ward, says that he failed to file an answer herein for the following reasons:

He had not examined the petition, and supposed it was merely filed for the purpose of foreclosing the mortgage debts of already due, and as he was coming to Kentucky to attend this November term of this court on other business, he thought he would be in ample time to take any steps necessary to protect his interest, by providing what part of the mortgaged property should be sold to satisfy said debt. He was detained in Arkansas on important business, so that he did not reach Lexington till the night of the 25th of November, 1873, and did not know until after his arrival here that pl't'ffs claimed anything more than the foreclosure of the debt aforesaid.

ZEB WARD.

Sworn to by Zeb Ward, Dec. 6, 1873.
Att.:

J. B. RODES,
C. F. C. C.

55 And afterwards, at a term of court continued and held for said circuit on the 9th day of December, 1873, the following was had:

JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, &C., DEFENDANT. } In equity.

The judgment and amended judgment heretofore entered in this cause

having been set aside, and the defendant, Zeb Ward, being allowed to file his answer, the court now adjudges upon the pleadings and exhibits that plaintiff recover of the defendant, Zeb Ward, the sum of three thousand dollars, with interest thereon at the rate of seven per cent. per annum, from the 31st day of July, 1872, until paid and his costs herein expended.

It is further adjudged that the equity of redemption of the defendant, Ward, in the mortgaged property under the mortgage deed of July, 1872, be foreclosed, and so much of said property as is sufficient to pay
56 the debts and costs aforesaid and expenses of sale be sold at public auction at the court-house door in Lexington, Ky., on a day to be fixed by the commissioner, making the sale on a credit of six and twelve months, the purchaser giving bonds with sufficient personal security for the price, which bonds shall have the force of a judgment and remain a lien upon the property till paid. The time, place, and terms of sale shall be advertised for two weeks next before the day of sale in the Lexington Press, a newspaper printed and published in Lexington, Ky.

The commissioner making the sale is directed to offer first so much of the personal property or machinery mentioned in said mortgage as will be sufficient to satisfy the debts, costs, and expenses aforesaid. If said personal property, or a part of it, sells for enough to satisfy said debt, &c., then no further sale shall be made.

In the event, however, that said personal property proves in-
57 sufficient to satisfy said debt, &c., then the commissioner is directed to sell so much of the mortgage property, including the real estate embraced in said mortgage, as will be sufficient to satisfy the debt, interest, and costs aforesaid.

The master commissioner, B. G. Thomas, is ordered to make the sale and is allowed $50.00 for his services, to be taxed as part of the costs.

Upon the other questions raised in the petition and answer herein the court takes further time.

To which judgment of the court the defendant excepts.

And at a term of court continued and held for said circuit on the 11th day of December, 1877, the following order was had:

JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, &C., DEFENDANT. } In equity.

The plaintiff this day moved the court upon notice duly executed, filed and noted to appoint a receiver to take charge of the mortgaged property herein.

58 The notice as above referred to filed and noted is as follows viz:

Notice.

Fayette circuit court.

TODD, SURVIVOR, &C., PLAINTIFF,
vs.
ZEB WARD, DEFENDANT.

The defendant, Zeb Ward, will take notice that upon Thursday morn-

ing, Dec. 11th, 1873, I will move the Fayette circuit court to put the mortgaged property in controversy in the above action in the hands of a receiver.

J. C. TODD, *Survivor, &c.*
By KINKEAD & DARNALL,
Att'ys.

And afterwards, in said court, on the 22nd day of December, 1873, at a term thereof, the following proceedings were had, viz:

JOSEPH TODD, SURVIVOR, &C., PLAINTIFF,
against.
ZEB WARD, &C., DEFENDANT. } In equity.

The motion of the plaintiff for the appointment of a receiver herein was this day heard, and the court advised it is ordered that said motion be overruled.

To which plaintiff excepts.

59 And afterwards at a term of court continued and held for said circuit on the 2nd day of February, 1874, the following was had:

JOSEPH TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, DEFENDANT. } In equity.

The master commissioner, B. G. Thomas, this day returned the following report of sale herein:

Your commissioner respectfully reports that he advertised as directed in your order of last November term, and publicly sold to the highest bidder at the front door of the court-house, according to the terms of the judgment herein, on Monday the 19th day of January, 1874, at 12 o'clock m., a part of the personal property in said order described.

The least part of all the machinery and fixtures that could be sold was the whole of all said machinery and fixtures, except the five old looms, and said machinery and fixtures, except the five old looms, were
60 sold to the plaintiff herein for $3,997.25, said plaintiff being the highest bidder for said personal property, and said sum being the amount of plaintiff's debts, interest, and cost. The purchaser being the plaintiff herein no bonds were executed.

In every particular your order has been observed by your master commissioner.

Respectfully submitted,

B. G. THOMAS,
M. C. F. C. C.

And afterwards at a term of court continued and held for said circuit, on the 5th day of February, 1874, the following proceedings were had:

JOSEPH TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, &C., DEFENDANT. } In equity.

The master report of sale herein having been duly returned & no ex-

ceptions thereto, it is ordered by the court that said report be confirmed, and the commissioner is directed to deliver the property sold to the purchaser, J. C. Todd, survivor, &c.

61 And afterwards at a term of court continued and held for said circuit on the 15th August, 1874—

JOSEPH TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, &C., DEFENDANTS. } In equity.

The plaintiff produced and offered to file an amended petition herein, to which the defendant Ward, by counsel, objected, which objection was overruled by the court, and said amended petition permitted to be filed, which is noted.

To the filing of which the defendant excepts.

The plaintiff filed an affidavit herein, which is noted.

The defendant, Zeb Ward, is warned to appear in this court on the first day of its next November term, 1874, and answer the amended petition of the plaintiff, and H. M. Buford, esq., is appointed corresponding attorney for the non-resident defendant, Zeb Ward, herein.

The amended petition, as noted, is as follows, viz:

Amended petition in equity.

Fayette circuit court.

62 JOSEPH C. TODD, SURVIVOR OF THE firm of Todd & Rafferty, plaintiff,
vs.
ZEB WARD, &C., DEFENDANT.

The plaintiff, Joseph C. Todd, survivor of the firm of Todd and Rafferty, by way of amendment to his former petitions, says that since the filing of said former petitions, and since the last term of this court, the debt set forth in the 2nd paragraph of plaintiff's original petition has become due, to wit: Upon the 17th day of June, 1874. Said debt is evidenced by the promissory note of the defendant Zeb Ward, which is in the following words and figures, viz:

$10,733.28.] LEXINGTON, KY., *June 17th*, 1872.

Two years from date I promise to pay to the order of Todd and Rafferty ten thousand seven hundred and thirty-three & $\frac{28}{100}$ dollars, with interest from date at the rate of seven (7) % per annum till paid.

(Signed) ZEB WARD.

This note is secured by mortgage duly stamped.

The original note is filed herewith. No part of said debt has ever been paid.

63 Plaintiff says that the debt herein mentioned is secured by mortgage upon the factory property of said Ward, situated in the city of Lexington, as will more fully appear by the 2nd paragraph of plaintiff's original petition, as also by the deed of mortgage filed therewith, all of which are here referred to and made part of this amendment, so far as they relate to the debt herein set up.

Plaintiff states that the machinery and fixtures mentioned in said mortgage have all been sold, save five old looms, to satisfy the former judgment in this action, as will more fully appear by the master commissioner report returned herein February 2nd, 1874, and he says that the lien of the mortgage made to secure the debt set forth in this amended petition covers all of the real estate mentioned in it as well as the five (5) old looms mentioned in said commissioner's report.

Wherefore plaintiffs asks judgment for his debt, for a foreclosure of the mortgage to satisfy the same, for a sale of so much of said
64 mortgaged property as may be necessary to pay said debt, interest and costs, and for all general and special relief in the premises.

KINKEAD & DARNALL,
p. q.

The note attached to said petition is as follows:

$10,733.28.] LEXINGTON, KY., *June 17th*, 1872.

Two years from date I promise to pay to the order of Todd & Rafferty ten thousand seven hundred and thirty three & $\frac{28}{100}$ dollars, with interest from date at the rate of seven (7) % per annum till paid.

ZEB WARD.

This note is secured by mortgage duly stamped.

The affidavit as noted August 15th, 1874, is as follows:

Affidavit for warning order.

Fayette circuit court.

TODD, SURVIVOR, &C., }
vs. }
WARD, &C. }

Geo. W. Darnall says he is agent for the plaintiff J. C. Todd, survivor, &c., who is now absent from Fayette County, Ky. He says that
65 the defendant Zeb Ward is a non-resident of Kentucky.

GEO. W. DARNALL.

Sworn to before me by G. W. Darnall, this 15th day of August, 1874.

WATTS PARKER,
Examiner Fayette Co., Ky.

And on the 9th day of September, 1874, there was issued a summons by the clerk of said court, and a copy of *of* the amended petition last filed herein attached thereto, and also a copy of each, viz, the summons and amended petition.

The summons is as follows, viz:

(Section 86.)

The commonwealth of Kentucky to Zeb Ward, greeting:

You are warned to appear and answer within sixty days after the service of this summons on you the amended petition hereto annexed, filed against you by Joseph C. Todd, survivor of the firm of Todd & Rafferty,

n the Fayette circuit court, and you are warned that upon your failure to answer said petition will be taken for confessed, or you will be
66 proceeded against for contempt.

This summons is returnable on the 1st day of the next November term of said court.

Witness Asa McConathy, clerk of said court, this 9th day of September, 1874.

ASA McCONATHY,
C. F. C. C.

This summons with the copy of the petition was returned to the office of the clerk of said court with the following endorsement as a return on it, viz:

Executed the within summons by delivering a true copy of the same with a copy of the amended petition and the exhibits to Zeb Ward, at Little Rock, in the county of Pulaski, State of Arkansas, this 23rd day of September, 1874, at 2 p. m., said Zeb Ward being personally known to me. Witness my hand this 23rd day of September, 1874.

[SEAL.] H. H. ROTTAKEN,
Sheriff Pulaski Co., Arkansas,
By A. C. BEATTY,
Deputy Sheriff.

STATE OF ARKANSAS,
Pulaski County, ss:

67 Personally appeared before me, A. J. Thompson, a notary public within and for the county and State aforesaid, the above-named A. C. Beatty, well known to me to be a person worthy of credit, and he made oath that the afore statement subscribed by him was true.

Witness my hand and seal this 25 day of September, 1874.

[SEAL.] A. J. THOMPSON,
Notary Public.

And afterwards at a term of court continued and held for said circuit, on the 20th day of November, 1874, in said case was the following:

JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, &C., DEFENDANTS. } In equity.

This cause was this day heard. The petition of H. P. McGrath, offered to be filed herein Dec. 5th, 1873, is now permitted to be filed, which is therefore filed and noted.

The parties filed agreed facts herein, which are noted.

The petition of H. P. McGrath as noted is as follows, viz:

68 *Petition of H. P. McGrath.*

Fayette circuit court.

TODD, SURVIVOR,
vs.
ZEB WARD.

The petitioner, H. P. McGrath, says he was surety for def't Ward in a debt due to Miss R. Jennie Worley of $4,757.50, on which suit was

brought in the Woodford circuit court, and judgment was rendered against said Ward and this petitioner for said debt, with interest from April 2nd, 1871, and $34.40 cost of the action. Ward paid on said judgment $3,995.00 on the 12 of November, 1873, or it was paid out of the proceeds of Ward's property. This petitioner paid the balance of said judgment, and the benefit of it was assigned to him according to law.

On the 28th day of November, 1873, this petitioner caused an execution to be issued on said judgment from the office of the Woodford circuit clerk to the county of Fayette, and the same was levied by the sheriff of Fayette County on so much of the lot described in the petition herein as is not occupied by the factory building and
69 not covered by the mortgages filed by pl't'ffs, and in the equity of redemption of debt in the factory, which is covered by said mortgage.

This petitioner says that pl't'ffs have no lien on any part of said lot for the $600 purchase money, which they allege was paid by them to the city of Lexington; but if they have any lien whatever they are not entitled to collect the whole of the same by sale of the part of the property not embraced in the mortgage, but the same should be ratably assessed and collected from the part included in the mortgage and the part not so included.

He says that if pl't'ff acquired any lien by the tax sale set up the money for said tax is not due, and they are not entitled to enforce said lien for two years from the date of said sale.

Wherefore he prays to be made a party to this action, and that the order of sale heretofore entered herein be set aside, and for all proper, legal, and equitable relief.

70 AUNTIN & MILLIGAN AND BUFORD.

H. P. McGrath says he believes the facts stated in the foregoing petition are true.

HENRY P. McGRATH.

Sworn to by H. P. McGrath December 3rd, 1873.
Att.:

J. B. RODES, *C. F. C. C.*

The agreed facts filed November 24th, 1874, is as follows, viz:

Agreed facts.

Fayette circuit court.

JOSEPH C. TODD, SURVIVOR OF THE FIRM OF Todd & Rafferty, plaintiff,
against
ZEB WARD, DEFENDANT.

Upon the part of the plaintiff and H. P. McGrath, it is agreed—

1. That during the winter and spring of 1871 Zeb Ward built in the rear and immediately joining his main factory building a smaller for the purpose of being used as a hackling house for hemp, although it was never used for hackling.

71 2. It is agreed that during the summer of 1872, at the time of the execution of the mortgage dated June 17, 1872, from Zeb Ward to Todd & Rafferty, that said building was used to store coal and fuel for the purpose of running the engine in said factory upon which the mortgage was placed.

3. That said building is erected adjoining said main factory building, but upon a distinct foundation, and the walls of the two have no connection, and that it has no connection by door or window with the main factory.

KINKEAD & DARNALL,
Att'y for Todd & Co.
H. MARSHAL BUFORD,
For McGrath.

And afterwards, at a term continued and held for said circuit on the 27th day of November, 1874, the following was had in said cause:

JOSEPH C. TODD, SURVIVOR OF THE FIRM OF Todd & Rafferty, plaintiff,
against
ZEB WARD, &C.
} In equity.

72 This action having been submitted to the court, and the court sufficiently advised upon the answer of H. P. McGrath, the mortgage deed of June 17th, 1872, and the agreed facts, and the court being sufficiently advised, it is now adjudged that the lot and building mentioned in said agreed facts as having been built for a hackling-house is covered by said mortgage deed, and that said hackling-house and lot are subject to the payment of plaintiff's debt mentioned in said mortgage of June 17th, 1872.

To which def't McGrath excepts and prays an appeal to the court of appeals, which is granted.

This action having been submitted to the court and the court sufficiently advised, it is now ordered and adjudged that the plaintiff, Joseph C. Todd, survivor of the firm of Todd & Rafferty, recover of the defendant, Zeb Ward, the sum of ten thousand seven hundred and thirty-three and $\frac{28}{100}$ dollars, with interest thereon at the rate of
73 seven per cent. per annum from the 17th day of June, 1872, until paid, and his costs herein expended.

It is further adjudged that the equity of redemption of the defendant, Zeb Ward, in the mortgaged property in the petition mentioned be foreclosed, and so much of said property, viz, the house and lot of ground in the city of Lexington, Kentucky, used and occupied by the said Ward as a hemp and bagging factory, as also the small hackling-house adjoining in the rear and below said factory, and situated in said city on Vine and Water streets, near the shop and mill owned by Garrett Wilgus, together with the rights, privileges, and appurtenances thereunto belonging, as is sufficient to pay the debt and costs aforesaid, and expenses of sale be sold at public auction at the court-house door in Lexington, Kentucky, on a day to be fixed by the commissioner, making the sale on a credit of six and twelve months, the pur-
74 chaser giving bonds with sufficient security for the price, bearing interest from the day of sale till paid after the rate of seven per cent. per annum, which bonds shall remain a lien upon the property sold till paid, and shall have the force and effect of a judgment.

The commissioner is directed to take the bonds payable to the order of the plaintiff herein; the time, place, and terms of sale shall be advertised for two weeks next preceding the day of sale in a newspaper printed and published in the city of Lexington, to be selected by the said commissioner.

The master commissioner of this court is ordered to make the sale and is allowed $10.00 for his services, to be taxed as part of the costs.

Execution may be issued for any part of the debt and costs adjudged to the plaintiff that may remain unpaid by the sale of the mortgaged property.

It is further adjudged by the court that so much of plaintiff's
75 petition as relates to the claim of $680.00 paid to the city of Lexington by plaintiffs for the original price of the lot mentioned be and the same is hereby dismissed, and so much of the petition as relates to the claim of $55.00 paid by plaintiff to R. S. Bullock, sheriff for Fayette County, for State taxes for the year 1872, is also dismissed, and this cause is continued.

The defendant, H. P. McGrath, excepts to so much of the foregoing judgment as orders a sale of the hackling house in the rear and below the main factory building, and prays an appeal to the court of appeals, which is granted.

And afterwards, on the 30th day of December, 1874, the master commissioner, Caleb B. Bullock, lodged his report of sale in the office of the clerk of our said court.

And at a term of court continued and held for said circuit on
76 the 22nd day of January, 1875, the following proceedings were had:

JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, &C., DEFENDANT. } In equity.

The report of sale of the master commissioner, C. B. Bullock, heretofore lodged in the clerk's office, is now ordered to be recorded, viz:

Comm'r's report of sale.

Fayette circuit court.

TODD, SURVIVOR, &C.,
vs.
WARD, &C.

Your commissioner respectfully reports that he advertised as directed in your order entered at the November term, 1874, in the Lexington Dispatch, a newspaper published in Lexington, K'y (a copy of advertisement is filed herewith), and publicly sold to the highest bidder at the front door of the court-house for Fayette County, in Lexington, K'y, according to the terms of the judgment herein, on Monday, the 21st day of December, 1874, at 12 o'clock m., the property in said order described—less than the whole property
77 could not be sold—and the highest bid offered at said public sale for said property was seven thousand dollars ($7,000$\frac{00}{100}$), and said bid was made for the plaintiff herein by his att'y, Geo. W. Darnall, esq., and said plaintiff was then declared by your commissioner to be the purchaser of said property for said price. The order directing that bond should be taken payable to plaintiff, no bond was required.

All of which is most respectfully submitted,

CABELL B. BULLOCK,
M. C. C. F. C. C.

The advertisement is as follows:

Commissioner's sale.

TODD, SURVIVOR, &C.,
vs.
WARD, &C.

By an order of the Fayette circuit court in the aboved-named action I will sell to the highest bidder at the front door of the court-house for Fayette County in Lexington, K'y, on Monday, 21st day of December, 1874, at 12 o'clock m., on a credit of six and twelve months, the
78 purchaser giving bonds with sufficient security for the price bearing interest from the day of sale till paid, after the rate of seven per cent. per annum, which bonds shall remain a lien upon the property till paid, and shall have the force and effect of a judgment, so much of that house and lot of ground in the city of Lexington, K'y, formerly used and occupied by Zeb Ward as a hemp and bagging factory, also the small hackling house adjoining in the rear and below said factory and situated in said city on Vine and Water streets near the shop and mill owned by Garrard Wilgus, together with the rights, privileges, and appurtenances thereunto belonging as is sufficient to pay a debt of $12,619.95, together with the costs and expenses of this suit and sale.

CABELL B. BULLOCK,
M. C. F. C. C.

KINKEAD & DARNALL, *P. G.*

And at a term of court continued and held for said circuit on the 22nd day of January, 1875, was had—

JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
against
79 ZEB WARD, &C., DEFENDANT. } In equity.

It is ordered that the report of sale returned and entered herein January 2nd, 1875, be confirmed, no objections being made or exceptions filed thereto, and the master commissioner is ordered to execute a deed for said property to the purchaser.

The master commissioner, C. B. Bullock, produced and acknowledged a deed to Joseph C. Todd, surviving partner of the firm of Todd & Rafferty herein, which was examined by the court, approved, and ordered to be certified to the clerk of the proper court for record.

Ordered that the sheriff of Fayette County put the purchaser, Jos. C. Todd, survivor, &c., into immediate and full possession of the property bought by him under the judgment and sale herein.

And afterwards, at a term of court continued and held for said
80 circuit on the 3rd day of February, 1875, the following proceedings were had, viz:

JOSEPH C. TODD, SURVIVOR, &C., PLAINTIFF,
against
ZEB WARD, &C., DEFENDANTS. } In equity.

On motion of the plaintiff, it is ordered that these causes be filed away with leave to reinstate the same at any time hereafter, by motion.

STATE OF KENTUCKY:

Fayette circuit court.

I, Asa McConathy, clerk of the said Fayette circuit court, certify the foregoing forty-nine pages and upwards contain a full, true, and complete copy of the record and the whole of the said record in the suit in equity in the said court wherein Joseph C. Todd, survivor of the firm of Todd & Rafferty, is plaintiff, and Zeb Ward, &c., defendants, and the same appears of record in my office.

81 In testimony whereof I hereunto sign my name and affix the seal of said court, at office in the city of Lexington, this 12th December, 1877.

Att.:

[SEAL.] A. McCONATHEY,
Clerk.

STATE OF KENTUCKY:

Fayette circuit court.

I, Joseph D. Hunt, sole presiding judge of said Fayette circuit court, certify that Asa McConathy, whose genuine signature appears to the within and foregoing certificate, is, and was at the time of signing the same, clerk of the said court, duly elected and qualified, and that all his official acts as such are entitled to full faith and credit, and ought to be so received, and that his attestation thereto is in due form of law.

Witness my hand this 12th day of December, 1877.

J. D. HUNT,
Judge Fayette Circuit Court.

82 To the introduction of which the defendant objected, because the said judgment and proceeding do not show any service of process on the defendant or any appearance by him, either in person or by counsel, but the court overruled this objection, and permitted the said transcript to be read in evidence, to which ruling the defendant excepted at the time, and to save his exceptions, asked and obtained leave to file his bill of exceptions at any time during the present term of this court; and now, on this day and during the same term, the defendant presents here this his bill of exceptions, which being examined and found correct is now signed, sealed, and made a part of the record herein, on this first day of May, 1878.

[SEAL.] HENRY C. CALDWELL,
Judge.

83 And on May 14th, 1878, as follows:

JOSEPH C. TODD, SURVIVOR,
v.
ZEB WARD.

On this day came the plaintiff, by Charles P. Redmond, esq., his attorney, and also came said defendant, by N. M. Rose, and Henderson & Carruth, esq's, his attorneys, and the writ of error sued out in this cause to the Supreme Court of the United States is now allowed by the judge of this court, and the supersedeas bond of the defendant is filed herein and is by the court approved, whereupon it is ordered that the execution of the judgment in this cause be superseded until the further

orders of said Supreme Court, and the attorney for the plaintiff accepts service of the citation herein.

Which bond is as follows:

Know all men by these presents that we, Zeb Ward, as prin-
84 cipal, and John G. Fletcher, as sureties, are held and firmly bound unto Joseph C. Todd, in the just and full sum of ten thousand dollars, to be paid to the said Todd, his certain attorney, executors, administrators or assigns, jointly and severally, by these presents, sealed with our seals, and dated this 9th day of May, in the year 1878.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Arkansas, in a suit depending in said court, between said Todd, as plaintiff, and said Ward, as defendant, judgment was rendered against the said Ward; and he having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid court, and a citation directed to the said Todd, citing him to appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next:

85 Now, the condition of the above obligation is such that if the said Ward shall prosecute to effect his said writ of error, and answer all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

ZEB WARD. [SEAL.]
J. G. FLETCHER. [SEAL.]

U. S. A.,
E. Dist. Ark., ss:

I, Zeb Ward, being duly sworn, say that after payment of my just debts I would have property subject to execution of the value of ten thousand dollars.

ZEB WARD.

Sworn to and subscribed before me this 13th day of May, 1878.
[SEAL.] RALPH L. GOODRICH,
Clerk.

86 U. S. A.,
E. Dist. Ark., ss:

I, John G. Fletcher, being duly sworn, say that after payment of my just debts, I would have property subject to execution of the value of ten thousand dollars.

J. G. FLETCHER.

Sworn to and subscribed before me this 13 day of May, 1878.
[SEAL.] RALPH L. GOODRICH, *Clerk.*

This bond taken, filed and approved, May 14, 1878.
HENRY C. CALDWELL,
District Judge.

Filed April 14th, 1878.
RALPH L. GOODRICH, *Clerk.*

Which citation is as follows:

87 The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern

district of Arkansas, wherein Zeb Ward plaintiff in error and you are defendant in error, to show cause, if any there, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry C. Caldwell, judge of the district court this 14th day of May, A. D. 1878.

[SEAL.] HENRY C. CALDWELL,
District Judge.

I, Charles P. Redmond, attorney of record of the within named Joseph C. Todd, hereby accept service of the within citation.

May 14, 1878.

CHAS. P. REDMOND,
Att'y for Pl'ff.

Filed May 14, 1878.

RALPH L. GOODRICH, *Clerk.*

88 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

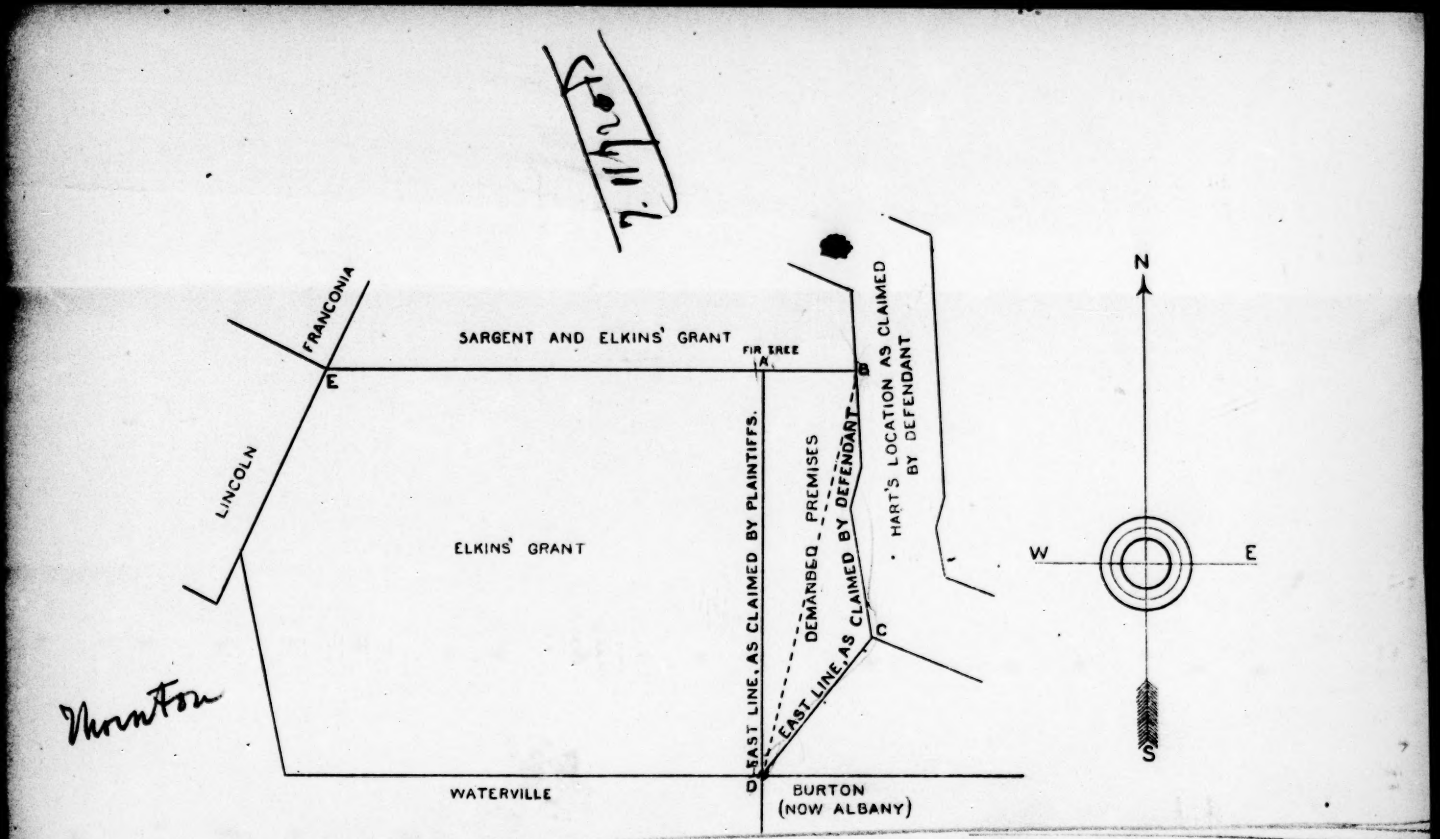
I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court, this 27th day of May, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and second.

Attest:

[SEAL.] RALPH L. GOODRICH, *Clerk.*

(Indorsement on cover:) No. 425. Zeb Ward, plaintiff in error vs. Joseph C. Todd, survivor of the firm of Todd & Rafferty. E. Arkansas C. C. U. S. Filed 4th June, 1878.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HART'S LOCATION AS CLAIMED BY DEFENDANT
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OFFICE SUPREME COURT U. S.
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JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ZEB WARD, Plaintiff in Error,

vs.

JOSEPH C. TODD, as Survivor of the Firm of Todd & Rafferty, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

PRINTED BY JAMES MITCHELL, STATE PRINTER.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ZEB WARD, Plaintiff in Error,

vs.

JOSEPH C. TODD, as Survivor of the Firm of Todd & Rafferty, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

HISTORY OF THE CASE.

Todd sued Ward on a judgment rendered in Kentucky Ward pleaded,

1. Fraud in procuring the judgment.
2. *Nul tiel record.*
3. Accord and satisfaction.

The court sustained a demurrer to the first and third defences.

Trial was had on the defence of *nul tiel record.*

To sustain his case, the plaintiff was allowed, over the objections of the defendant, to read in evidence a transcript of a certain suit brought by the plaintiff against the defendant in

the Fayette Circuit Court, in the State of Kentucky, on the 8th of August, 1873, in Chancery. The petition in that suit of the plaintiff, set forth that Ward owed Todd the amount named in a promissory note executed by him on the 31st July, 1872, for $3,528, secured by a mortgage on land; also, that Ward owed plaintiff, as such survivor, another note of $10,733 28, dated June 17, 1872, payable two years after date. Prayer for judgment on the first note mentioned, for a foreclosure of the mortgage, "and that the court will retain the residue of the proceedings to satisfy the debts set forth in the" other paragraphs of the bill: *i. e.*, the note not then due, and a certain claim for taxes made in the suit.

Summons was issued, and was served on the defendant on the 8th September, 1873.

On the 17th day of the same month, the plaintiff filed an amendment to his petition, showing that he had bought of the city of Lexington a claim against Ward, which was a lien on the property mortgaged, and asking that he have a decree to enforce the same.

A new summons was issued, and was served on Ward on the 18th day of the same month.

On the 19th day of November, 1873, decree was rendered against Ward for the amount of the first note and the foreclosure of the mortgage. A master was ordered to sell the mortgaged property, and to report at the next term.

Ward afterwards moved to set the decree aside; which was done, and on a new hearing a decree was rendered against him for a few hundred dollars less than the amount named in the first decree; this was on the 9th December, 1873.

Just after the decree there is a date, "11th day of December, 1877," which is an obvious and unimportant clerical or typographical error. It should be "11th day of December, 1873." *Record, page 57.*

On the 2d of February, 1874, the Master made his report of sale, which was confirmed on the next day. *Record 59, 60.*

This was the end of the suit.

But on the 15th of the following August, and at a subsequent term, the plaintiff got leave to file an amended petition, setting up the second note for $10,733 28, and asking for judgment on it.

The order is as follows:

"The plaintiff produced and filed an amended petition herein, to which the defendant, Ward, by counsel, objected, which objection was overruled by the court, and said amended petition permitted to be filed; which is noted. To the filing of which the defendant excepts." *Record, 61.*

Plaintiff also filed an affidavit of the non-residence of Ward, and a warning order was made against him.

A summons was issued against Ward, and it, with a copy of the petition, was served on him, at Little Rock, in the State of Arkansas, quite beyond the jurisdiction of the court.

Without any farther service the court rendered judgment against Ward, on the 27th November, 1874, for the amount of the second note and interest.

On the trial of the present suit the defendant objected to the reading of the transcript of the proceedings in Kentucky, because it did not show any service on him, or appearance on his part. The court overruled this objection, and the defendant excepted and brought error.

ASSIGNMENT OF ERROR.

The Court below erred in permitting the transcript of the Kentucky judgment to be read in evidence.

The objection of counsel to the filing of the amended petition was only a special appearance, and was so treated by the plaintiff, who proceeded to take a warning order.

The service in Arkansas was, of course, a nullity.

Freeman on Judgments, Section 564.

Pennoyer V. Neff, 95 U. S., 714.

There was then neither service nor an appearance. The proceeding called an amended petition was, for all intents and

purposes, a new suit. The plaintiff so regarded it, and therefore asked for new process.

In the case of *Maude* v. *Rodes*, *4 Dana*, *147*, it was held that where a defendant appeared in court by his counsel and objected to the jurisdiction, this step did not give the court jurisdiction of his person. See also

Campbell v. *Swasey*, *12 Ind.*, *70.*
Allen v. *Lee*, *6 Wis.*, *478.*
Hodges v. *Brett*, *4 Geeene*, *Iowa*, *345.*
Milbourn v. *Fouts*, *Id.*, *346.*
Ulmer v. *Hiatt*, *Id.*, *439.*
Johnson v. *Buell*, *26 Ill.*, *66.*
Weil v. *Lowenthal*, *10 Iowa*, *575.*
Billiu v. *White*, *15 La.*, *624.*
Camp v. *Tibbetts*, *2 E. D. Smith*, *20.*
Stetson v. *Goldsmith*, *30 Ala.*, *602.*
Nye v. *Liscombe*, *21 Pick,*, *268.*
Pomeroy v. *Betts*, *31 Mo.*, *419.*
Schell v. *Leland*, *45 Mo.*, *289.*
Standley v. *Arnow*, *13 Fla.*, *361.*
Crary v. *Barber*, *1 Col. Ter.*, *172.*
Walling v. *Beers*, *129 Mass.*, *548.*
Deeper v. *New York Belting Co.*, *11 Blatchf*, *76.*
Dorr v. *Gibboney*, *3 Hughes*, *382.*
Atkins v. *Fibre Co.*, *7 Blatchf*, *555.*
Bank v. Anderson, *3 Sneed*, *669.*
Commercial Bank v. *Slocomb*, *14 Peters*, *60.*

Did not this court decide the same thing at the last term? Such is the impression of the writer; but after looking over many law publications, he has not been able to find a report of the case.

There is no statute in Kentucky authorizing a supplementary petition to be filed in a suit after a final decree, without notice to the party to be unfavorably affected by it. And if there were such a statute, a judgment obtained under it would

not be within the purview of the act of Congress of May 26, 1790. *D'Arcy* v. *Ketchum, 11 How., 587.*

In *Kinney* v. *Consolidated Co., 4 Sawyer, 382,* after a final decree and the end of the term at which that decree was made, a supplemental decree was rendered by consent; and it was held void.

The court in Kentucky seems to have been misled into rendering a personal judgment against Ward, by sections 86 and 87 Kentucky Code of Practice, (Myers).

Section 86 provides a mode for the service of process on persons out of the State, to-wit: by serving on defendant a certified copy of the petition with a summons annexed thereto, warning defendant to appear and answer within sixty days.

Section 87 provides that—

"The certified copy and summons, with the affidavit and "certificate as provided in the last section, being returned "and filed in the action, shall be deemed an actual service of "the summons."

Now, Ward was a citizen of Arkansas, as appears from the Record; a warning order was taken against him, and he was then served in Arkansas in accordance with the provisions of sections 86 and 87, *supra.*

Section 87 having declared that such service should be deemed *actual service*, the Kentucky Judge gave a personal judgment.

If, however, those sections did mean to provide for such extra territorial process, we take it that no serious argument would be necessary to prove that it could not be maintained.

But that jurist overlooked another provision of the Kentucky Code of Practice, (Myers): Section 450, which provides "No personal judgment shall be rendered against a "defendant constructively summoned, or summoned out of "this State as provided in section 86, and who has not ap-"peared in the action."

The personal judgment, therefore, against Ward in the Fayette Circuit Court, is in direct contravention of this provision.

Such has been the determination of the Court of Appeals of Kentucky in *Griswold* v. *Popham*, *1 Duvall*, *170*.

In that case the court holds that "although the service prescribed in the 86th section of the Code is therein denominated '*actual*,' contradistinguished from '*constructive*,' as defined in section 88, yet section 450 forbids a judgment "*in personam* against not only a party 'constructively' summoned, but a defendant also who had been cited in the "mode prescribed in the said section 86. Consequently the "personal judgment was unauthorized."

Respectfully,

U. M. ROSE.